A

Tenaga Nasional Bhd v Claybricks & Tiles Sdn Bhd

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-2467–09 OF 2011
RAMLY ALI, JEFFREY TAN AND ZAHARAH IBRAHIM JJCA
23 NOVEMBER 2011

C

Civil Procedure — Disposal of case on point of law — Action disposed of without trial — Res judicata — Whether principle of res judicata applied to facts of present case — Whether earlier suit and present suit were subject to different causes of action — Whether trial judge erred in ruling that present claim should have been made in first suit — Whether case suitable for determination under O 14A of the Rules of the High Court 1980

D

The appellant filed an action against the respondent for loss of revenue occasioned by the alleged tampering of the electricity meter at the respondent's premises for the period 8 September 2004 to 11 May 2005. The respondent denied such alleged tampering and contended that the appellant's cause of action against the respondent was res judicata. The respondent submitted that prior to the present suit, there was an earlier suit ('the first suit') involving the same parties, in which the respondent had claimed for an order that the appellant be restrained from disconnecting the electricity supply to the respondent's premises. The appellant had then filed a defence and counterclaim against the respondent for loss of revenue occasioned by the alleged tampering of the electricity meter at the respondent's premises calculated from 27 January 2001 up to 28 September 2004 ('the counterclaim'). It was the respondent's case that the counterclaim estopped the appellant from proceeding by way of the present suit. The appellant argued that the counterclaim in the first suit dealt with losses sustained by the appellant up until 28 September 2004 before the second incidence of tampering on 11 May 2005. The respondent filed an application under O 14A of the Rules of the High Court 1980 ('RHC') to determine whether the appellant's present claim was res judicata. The respondent submitted that there was clear evidence that the alleged second tampering of the electric meter, which was the basis of the present suit, was apparent to the appellant when it filed the counterclaim in the first suit but it chose not to claim the same. Thus, the respondent contended that the appellant's failure to raise this issue in the first suit amounted to an abuse of process. The High Court judge ruled that the principle of res judicata applied to the facts of the present case and that the present claim should have been made in the first suit. The High Court judge thus allowed the respondent's O 14A application. This was the appellant's appeal against that decision. The appellant submitted that the present suit was unsuitable for summary disposal

E

F

G

H

I

and that it should not be estopped from proceeding by reason of the second incidence of electricity tampering.

Held, allowing the appeal with costs of RM5,000:

(1) There were two separate events of illegal tampering of the electricity meter at the respondent's premises, namely the tampering of the meter committed and discovered on 6 September 2004, which was the subject matter of the counterclaim in the first suit, and the second tampering, which was the basis of the present suit. It was clear that these two events were distinct and separate, and were subject to different causes of action. Therefore the plea of res judicata was not applicable. The present suit was premised on the second act of the respondent in reinserting an illegal wire shunt device to deviate electricity for the purpose of deceiving the appellant by the under-registration of power usage. The evidence to be adduced in the present suit was therefore separate and distinct; and sourced from a subsequent investigation with new investigative documents and evidence. Thus, the facts and issues in the present suit had not been adjudicated by the court in the first suit and the rights and liabilities of both parties had not merged into the judgment of the earlier suit. As such, the present cause of action was not estopped by the principle of res judicata (see paras 13–15).

(2) The present case was not an obviously unsustainable case to be struck out summarily pursuant to O 14A of the RHC. It was thus ordered that the case should be remitted to the High Court for hearing (see para 16).

[Bahasa Malaysia summary

Perayu memfailkan tindakan terhadap responden untuk kerugian hasil yang yang disebabkan oleh dakwaan pengusikan meter elektrik di premis responden untuk tempoh dari 8 September 2004 sehingga 11 Mei 2005. Responden menafikan dakwaan pengusikan sedemikian dan berhujah bahawa kausa tindakan terhadap responden adalah res judicata. Responden berhujah bahawa terdahulu daripada guaman tersebut, terdapat guaman terdahulu ('guaman pertama') melibatkan pihak yang sama, di mana responden telah menuntut untuk perintah bahawa perayu dihalang daripada tidak menyambungkan bekalan elektrik ke premis responden. Perayu kemudiannya memfailkan pembelaan dan tuntutan balas terhadap responden untuk kerugian hasil disebabkan oleh dakwaan pengusikan meter elektrik di premis responden dikira dari 27 Januari 2001 sehingga 28 September 2004 ('tuntutan balas'). Adalah kes responden bahawa tuntutan balas estop perayu daripada prosiding melalui guaman ini. Perayu berhujah bahawa tuntutan balas dalam guaman pertama berurusan kerugian yang dialami oleh perayu sehingga 28 September 2004 sebelum kejadian kedua pengusikan pada 11 Mei 2005. Responden memfailkan permohonan di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk menentukan sama ada tuntutan perayu ini adalah res

judicata. Responden berhujah bahawa terdapat keterangan jelas bahawa dakwaan pengusikan kedua meter elektrik, yang mana adalah asas guaman ini, adalah jelas kepada perayu apabila ia memfailkan tuntutan balas di dalam guaman pertama tetapi ia memmilih untuk menuntutnya. Responden oleh itu berhujah bahawa kegagalan perayu untuk membangkitkan isu ini dalam guaman utama merupakan salah guna proses. Hakim Mahkamah Tinggi memutuskan bahawa prinsip res judicata beraplikasi kepada fakta kes ini dan bahawa tuntutan ini patut dibuat di dalam guaman pertama. Hakim Mahkamah Tinggi oleh itu membenarkan permohonan A 14A responden. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu berhujah bahawa guaman ini tidak layak untuk pendengaran ringkas dan ia tidak patut diestop daripada prosiding atas alasan kejadian kedua pengusikan elektrik.

Diputuskan, membenarkan rayuan dengan kos RM5,000:

(1) Terdapat dua kejadian berasingan pengusikan tidak sah meter elektrik di premis responden, iaitu pengusikan meter yang dilakukan dan didapati pada 6 September 2004, yang mana adalah subjek tuntutan balas guaman pertama, dan pengusikan kedua, yang mana adalah asas guaman ini. Adalah jelas bahawa kedua-dua kejadian ini adalah nyata dan berasingan, dan adalah tertakluk kepada kausa tindakan berasingan. Oleh itu rayuan res judicata tidak beraplikasi. Guaman ini adalah diasaskan ke atas tindakan kedua responden dalam memasukkan alat mengalihkan wayar yang haram untuk melencongkan elektrik bagi tujuan menipu perayu dengan penggunaan kuasa yang tidak dikesan. Keterangan untuk dikemukakan dalam guaman ini oleh itu berasingan dan nyata; dan diambil daripada siasatan lanjutan dengan siasatan baru dokumen-dokumen dan keterangan. Oleh itu, fakta dan isu dalam kes ini tidak diputuskan oleh mahkamah dalam guaman pertama dan hak dan liabiliti kedua pihak tidak digabungkan ke dalam penghakiman guaman pertama. Oleh itu, kausa tindakan ini tidak diestop oleh prinsip res judicata (lihat perenggan 13–15).

(2) Kes ini jelas bukan kes yang dapat dikekalkan untuk dibatalkan secara ringkas menurut A 14A KMT. Oleh itu diperintahkan bahawa kes patut diremitkan ke Mahkamah Tinggi untuk pendengaran (lihat perenggan 16).]

Notes

For a case on action disposed of without trial, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 2964.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Legislation referred to

Rules of the High Court 1980 O 14A

Appeal from: Suit NCVC No 23–96 of 2011 (High Court, Johor Bahru)

V Vishnukumar (Alvin John & Parties) for the appellant.
Ang Boon Heng (Ang & Co) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

THE APPEAL

[1] The present appeal is against the decision of the learned High Court judge dated 19 August 2011 allowing the respondent's application for summary disposal of the suit pursuant to O 14A of the Rules of the High Court ('RHC') 1980 and thereby striking out the appellant's claim against the respondent with costs.

THE APPELLANT/PLAINTIFF'S CLAIM

[2] The appellant ('TNB') in the present suit claimed against the respondent for the sum of the RM875,246.26, calculated for the period of 8 September 2004–11 May 2005, being the loss of revenue occasioned by the alleged tampering of the electricity meter.

[3] The respondent in its defence, inter alia, denied such alleged tampering and contended that the appellant's cause of action against the respondent was res judicata or that the appellant is estopped from claiming against the respondent.

[4] On the question of res judicata the respondent's contention is that the issues of fact and law pertaining to the present suit filed with regard to a second or repeated incidence of electricity meter tampering was 'res judicata' on account of the facts and issues had been raised in a previous suit's counterclaim filed with regard to a prior incidence of electricity meter tampering and as such the respondent contended that the appellant was estopped from filing this present suit before the court.

[5] It is not in dispute that, prior to the present suit there was an earlier suit involving the same parties, where the appellant's counterclaim in that earlier suit was for damages on account of losses consequent to an illegal tampering of the electricity meter at the respondent's premises and judgment on liability was given in favour of the appellant with damages to be assessed on account of the losses sustained up until the stage of the first incidence of the tempering as at 8 September 2004.

[6] In the earlier suit (Civil Suit No 22–333 of 2005) filed in the High Court of Malaya at Johor Bahru on 20 May 2005, the respondent claimed for an order that the appellant (TNB) be restrained from disconnecting the electricity supply to the respondent's premises. The appellant then filed a defence and counterclaim on 29 July 2005 against the respondent for a sum of RM1,723,304.17 being the losses of revenue for the alleged tampering of the electricity meter at the respondent's premises calculated from 27 January 2001 up to 28 September 2004.

[7] The losses incurred from that date was assessed (up until 28 September 2004) before the second incidence of tampering on 11 May 2005 despite the rectification being done by removal the offending wire shunt on 8 September 2005.

[8] The respondent filed a summons in chambers under O 14A of the RHC 1980, to determine the question of law as to whether by reason of the cause of action filed by the appellant in its earlier counterclaim against the respondent the appellants' present claim is res judicata or that the appellant is estopped from claiming against the respondent.

[9] The respondent contended that there was clear evidence that the alleged second tampering (allegedly on 11 May 2005), which was the basis of the present suit, was apparent to the appellant when the appellant filed its counterclaim against the respondent in the earlier suit on 29 July 2005; but the appellant chose not to claim the same. The respondent submitted that the plea of res judicata applies as it covers facts which are clearly part of the subject matter of litigation and which could have been raised in that earlier proceeding, and thus it amounts to an abuse of the process to allow a new proceeding to be started in respect of the same.

[10] The appellant on the other hand, contended that there are various issues which render the suit unsuitable for summary disposal as the case cannot be determined on the basis of affidavit evidence and the suit should not be estopped from proceeding when there is in effect a second incidence of electricity meter tampering which is a repeated offence of theft committed by the respondent for which they are liable. The appellant prayed that the appeal be allowed and the suit be remitted to the High Court for trial.

[11] The learned High Court judge allowed the respondent's application pursuant to O 14A of the RHC 1980 and struck out the writ of summons and the statement of claim with costs. He ruled that the principle of res judicata applied to the facts of the present case; there are facts and issues in the earlier suit which also appear to exist in the present suit; and the present claim should

and could have been made in the earlier suit.

OUR FINDINGS

[12] From the facts of the case, we find that the appellant's claim in the earlier suit was for damages on account of losses incurred by them consequent to the illegal tampering of the electricity meter where judgment was given on 10 November 2010 in favour of the appellant with damages to be assessed on account of the losses sustained up until the stage of the first incidence of theft as at 8 September 2004. The losses occasioned from that date were assessed by the court up until 28 September 2004, before the second incidence of tampering on 11 May 2005 despite the rectification being done by removal of the offending wire shunt on the meter on 8 September 2004.

[13] The appellant had carried out two separate TNB investigations involving the respondent's premises, ie on 8 April 2004 and 11 May 2005. There were two separate police reports lodged by TNB officials. Clearly, there were two separate events of illegal tampering, which were distinct and separate, and are subject to different causes of action. Therefore the plea of res judicata is not applicable.

[14] Both the earlier and the present suits emanate from different torts as they were statutory offences committed separately at different times with different elements of 'actus reus' and 'mens rea' and hence did not share common facts. The first suit was based on the tampering committed and discovered on 6 September 2004, which was officially rectified on 8 September 2004. The present suit (second suit) was however based on a separate event of tampering and the wrongful reinsertion of a fresh wire shunt on the meter. We are of the view that the present suit is premised on a different and distinct cause of action sourced from the second act of the respondent in reinserting an illegal wire shunt device to deviate electricity for the purpose of deceiving the appellant by the under-registration of power usage. The evidence to be adduced in the present suit is separate and distinct; and sourced from a subsequent investigation with new investigative documents and evidence.

[15] The facts and issues in the present suit have not been adjudicated by the court in the earlier suit. Therefore the present cause of action is not estopped by the principle of res judicata. The rights and liabilities of both parties had not merged into the judgment of the earlier suit, (see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189).

CONCLUSION

[16] On the above consideration, we are of the considered view that this is

not an obviously unsustainable case to be struck out summarily pursuant to O 14A of the RHC 1980. The case should be remitted to the High Court for hearing. We therefore allow the appeal with costs of RM5,000 to the appellant. We also make an order that the deposit be refunded to the appellant and the case be remitted to the High Court for trial.

Appeal allowed with costs of RM5,000.

Reported by Kohila Nesan